SPORT RESOLUTIONS (UK)

NATIONAL ANTI-DOPING PANEL

SR/NADP/1016/2017

IN THE MATTER OF AN APPEAL IN PRECEEDINGS UNDER THE ANTI-DOPING RULES OF THE RUGBY FOOTBALL UNION

BEFORE:

Robert Englehart QC (Chairman)
Kitrina Douglas
Carole Billington-Wood

B E T W E E N:

BRANDON STAPLES ***Appellant***

and

RUGBY FOOTBALL UNION (RFU) ***Respondent***

DECISION OF THE APPEAL TRIBUNAL

INTRODUCTION

1. We were appointed as the Appeal Tribunal to hear this appeal by the Appellant, Brandon Staples, against a decision of an Arbitral Tribunal given on 30 November 2017, consisting of Mark Hovell, Blondel Thompson and Lorraine Johnson ("the Tribunal"). The appeal was heard by us on 28 March 2018 in accordance with directions given by the Chairman. In giving directions the Chairman had delivered two procedural rulings which are of particular materiality for the purposes of this appeal. First, the appeal was to proceed by way of review, that is to be limited to consideration whether the Decision was erroneous, rather than by way of a rehearing *de novo*. Second, Mr Staples was to be at liberty on the hearing of the appeal to adduce strictly confined fresh evidence in the form of a response by Professor Cowan to a specific request.

2. At the appeal Mr Staples was represented by Mr Baines and the Respondent, the Rugby Football Union ("the RFU"), was represented by Mr Segan. We are grateful to both Counsel for their concise and measured submissions. We would particularly wish to pay tribute to Mr Baines and Ms Parry of Kingsley Napley for representing Mr Staples *pro bono* before us (as they had done below).

THE BACKGROUND

3. The Tribunal gave a full decision. It is unnecessary for us to do more than briefly summarise sufficient of the factual background in order to make our decision understandable. If more detail is required, reference should be made to the Tribunal's decision ("the Decision").

4. Mr Staples is a young rugby player registered with Yorkshire Carnegie RFC, a club which plays in the RFU Championship. There is no dispute but that, as such, he was subject to the anti-doping regulations of the RFU which has adopted World Rugby Regulation 21 as its own Anti-Doping Regulations ("ADR"). The ADR follow the WADA Code and incorporate the WADA Prohibited List.

5. On 9 August 2017 Mr Staples was training at his club and was selected to undergo a urine test. He duly provided a urine sample. The urine was analysed and found to

contain (1) dehydrochlormethyltestosterone and its metabolite 6β-hdehydrochloromethyltestosterone (2) 6β-hydroxy methandienone and 17 epi-methandienone (metabolites of methandienone) and (3) Stanozolol-N-glucuronide (metabolite of Stanozolol). Mr Staples was duly charged by the RFU and admitted the Anti-Doping Rule Violation; the hearing before the Tribunal was only concerned with sanction.

MATERIAL ADR PROVISIONS

6. Under the ADR Regulation 21.10.2.1 the period of ineligibility for Mr Staples's Anti-Doping Rule Violation is four years. In the case of non-specified substances, such as the anabolic steroids here, however, the period could be reduced to two years if Mr Staples "can establish that the anti-doping rule violation is not intentional". The word "intentional" is a term of art and, as defined in the ADR, connotes knowledge that the ingestion of a prohibited substance is or entails a serious risk of being an anti-doping rule violation. It is not disputed but that for prohibited substances of the type found in this case the burden of establishing a lack of "intentional" conduct was on Mr Staples.

THE DECISION

7. In the event the sole issue before the Tribunal was whether Mr Staples had satisfied his burden of proof to establish that the Anti-Doping Rule Violation was not intentional. The only witness who was called to give direct factual evidence was Mr Staples himself. In addition, Ms Parry of Kingsley Napley provided some evidence of what she had been told by a South African trader about a Durban shop called Xtreme Nutrition having a reputation for selling so-called grey imports. There were also three character witnesses, one of whom gave evidence in person.

8. Mr Staples gave evidence about how some seven weeks before he was tested at Yorkshire Carnegie he had been in South Africa when he purchased a protein shake called Nitro-Tech. This must have been, albeit without his realising it, the source of the prohibited substances ultimately found when he underwent doping control testing. Nitro-Tech was a food supplement with which he was familiar and indeed had been taking in South Africa since he was 14. On the occasion in question he had bought the Nitro-Tech

from the Durban shop Xtreme Nutrition because he wanted to ensure he was getting enough protein. The shake was apparently produced by a company called Muscletech although Mr Staples has since discovered that Xtreme Nutrition is not in fact an authorised reseller of Muscletech products. Mr Staples told the Tribunal that, before purchasing the shake, he had consulted both the Muscletech and Informed Sport websites in order to check that there was nothing harmful in Nitro-Tech.

9. In the Decision the Tribunal did not explicitly say that it did not believe the evidence of Mr Staples. However, it held that Mr Staples had not satisfied them that the source of the steroids found in his system on 9 August 2017 was in fact the Nitro-Tech product which he claimed to have purchased in Durban some seven weeks previously. Since they were not satisfied about how Mr Staples came to have ingested the steroids, the Tribunal could not be satisfied that Mr Staples had not taken them intentionally. The Tribunal made no positive finding of intention against Mr Staples, but he had not discharged the burden of proof which was upon him if there were to be a reduction in eligibility from four years to two years.

10. In coming to their conclusion, the Tribunal treated the uncorroborated evidence of Mr Staples with considerable caution. They refrained from saying that independent evidence is always required before a player or athlete can satisfy a tribunal as to how he or she came to have ingested a prohibited substance. Nevertheless, in coming to their conclusion they tested Mr Staples's evidence by reference to various features, including in particular corroborative evidence which they considered Mr Staples could have, but had not, adduced. In these circumstances, the Tribunal was unable to accept what were merely assertions by the player himself.

11. One particular matter addressed in the Decision should be mentioned because it featured prominently in the submissions advanced by Mr Baines on behalf of Mr Staples. The Tribunal noted estimated concentration levels of the prohibited substances found in Mr Staples's system when he was tested on 9 August 2017. These were provided by Professor Cowan of Kings' College, London and were as follows:

(1) dehydrochlormethyltestosterone	500 ng/mL
(2) 6β-hdehydrochloromethyltestosterone	1500 ng/mL

(3) 6β-hydroxy methandienone	10 ng/mL
(4) 17 epi-methandienone	5 ng/mL
(3) Stanozolol-N-glucuronide	Estimate unavailable

The Tribunal noted that neither party provided the Tribunal with any evidence to show whether it would be possible to have ingested these particular prohibited substances seven weeks earlier and still have those concentrations in the system when tested. The Tribunal noted that the RFU did not have to advance a positive case but expressed itself as being at a loss to understand why Mr Staples had not provided an expert opinion as to whether this was indeed possible. In coming to its overall conclusion the Tribunal expressly noted that there was no evidence to show that taking a supplement seven weeks before a test could plausibly result in the concentrations of prohibited substances as it did.

THE FRESH EVIDENCE

12. As noted, the Chairman gave permission for Mr Staples to adduce fresh evidence on the appeal in the form of a response by Professor Cowan to one question, that is "whether the concentration levels of Prohibited Substances found in Mr Staples's sample could be compatible with their ingestion in a supplement about seven weeks previously". The question in fact asked of Professor Cowan by agreement of the parties did not quite follow the Chairman's ruling. He was asked if the concentration levels were consistent with the consumption of a contaminated protein shake around seven weeks beforehand. Unfortunately, the answer from Professor Cowan did not answer the question posed by the Chairman. He simply said: "it is my opinion that the competitor's account is not a reasonable explanation for the AAF [Adverse Analytical Finding]".

THE GROUNDS OF APPEAL

13. Mr Baines advanced three broad grounds of appeal on behalf of Mr Staples:

    (1) The Panel erred in drawing adverse inferences in respect of evidence that was not before it.

(2) The Panel erred (in principle) in finding that the Player had adduced 'no evidence' to demonstrate that the supplement he described was the source of the positive test.

(3) The Panel applied the wrong standard of proof in their decision.

14. The principal area where in Mr Baines's submission the Panel had wrongly drawn an adverse inference was in respect of the concentration levels in Mr Staples's system some seven weeks after he claimed to have taken a contaminated supplement and the failure of Mr Staples to provide any expert explanation about this. Mr Baines drew our attention to the fact that it was the RFU which had provided the evidence about the concentration levels; it was therefore, he said, incumbent on the RFU, not Mr Staples, to translate these levels into an understandable conclusion. He referred us to eight authorities where the Anti-Doping Organisation had provided the necessary expert evidence. In particular, he drew our attention to the NADP case of *UK Anti-Doping Limited v Hastings*, 18 November 2015 where Professor Cowan had been called by UKAD to express an opinion on the likelihood of a cyclist's explanation being consistent with an Adverse Analytical Finding some three months later. What was unfair on Mr Staples, he submitted, was to receive the evidence about concentration levels from the RFU but then criticise Mr Staples for not calling expert evidence to explain them, particularly when Mr Staples was not even asked in evidence why he had not obtained the expert evidence. Furthermore, the fresh evidence of Professor Cowan took matters no further. There was no explanation of what Professor Cowan meant by "not reasonable". That was not the same as unlikely and Professor Cowan, who had given his opinion *pro bono*, did not think it reasonable to commit more time in order to explain his reasoning.

15. There were also other respects in which the Tribunal had wrongly drawn adverse inferences. Mr Staples's girlfriend, who was said to have been with him when he purchased the Nitro-Tech, was not called to give evidence even though she was a student close by in Leeds; but Mr Staples had explained that he had not wanted to involve her. The Tribunal also noted that Mr Staples's parents could have, but did not, acquire in South Africa another example of Nitro-Tech so that there was nothing before the Tribunal on which they could assess the likelihood of it being the source of the steroids. Mr Baines submitted that it was not incumbent on an athlete to take every

investigative measure possible. The Tribunal had also wrongly relied on the fact that there was no evidence from anyone, even within Mr Staples's family to say that they had ever seen Mr Staples taking Nitro-Tech. But it would be quite wrong to speculate on evidence which was not before the Tribunal. Similarly, the Tribunal's suggestion that Mr Staples should have printed out a copy of the browsing history on his computer in order to corroborate his own evidence that he had checked the Muscletech and Informed Sport websites was asking too much.

16. Turning to the main point of principle, Mr Baines submitted that it was wrong of the Tribunal to have found that Mr Staples had not discharged the onus of proof upon him just because he had adduced no independent evidence. The Tribunal had not found that Mr Staples was untruthful nor that they did not believe his evidence. In essence, they had found against him simply because he was relying on his own evidence alone (apart from the marginal evidence of Ms Parry). There is no requirement under the ADR for corroborative evidence. And there have been cases where the only significant evidence on lack of intention came from the athlete himself. In particular, we were referred to the well-known NADP appeal decision in *UK Anti-Doping v Buttifant* (SR/NADP/409/2015). There, the athlete's word had been accepted despite the tablets he had ingested having been disposed of and despite a gap of more than forty days between ingestion of these tablets and the failed drug test. There was no other meaningful evidence than that of the athlete himself that the failed drug test must have been attributable to his having taken a product called M-Sten which must have been contaminated. We were also referred to the CAS case of *Villanueva v Fédération Internationale de Natation* (CAS/2016/A/4534) where the possibility that an athlete might show lack of intention on the basis of his own evidence alone when he could not show the source of a prohibited substance was not entirely excluded even if it meant an athlete passing through "the narrowest of corridors".

17. The third point taken on the appeal concerned the standard of proof. There is no doubt that the standard of proof is the balance of probability. However, Mr Baines points to paragraph 48 of the Decision where the Tribunal was discussing Mr Staples's evidence that he had bought Nitro-Tech in South Africa. In that context the Tribunal did say that they "could not be sure" that he took Nitro-Tech in South Africa. The word "sure" is, of course, more appropriate for the criminal standard of proof beyond reasonable doubt.

Nevertheless, it is fair to say that the Decision contains a number of references to the standard of proof being the balance of probability. Realistically, Mr Baines, whilst not resiling from the point, did not press it in argument.

THE RFU's CASE

18. For the RFU Mr Segan reminded us that there was no corroboration of Mr Staples's evidence about the purchase of Nitro-Tech and no evidence at all that this product had been contaminated. There was ample evidence which could have been obtained, by for example a test purchase, but was not. In these circumstances the Tribunal had been entitled not to be satisfied that Mr Staples had discharged the burden of showing lack of intention. And Mr Segan reminded us of the limited function of an Appeal Tribunal when addressing a Tribunal's findings of fact: see *Buttifant*, cited above, at paragraph 8.

19. In any event Mr Segan submitted that the Tribunal had clearly been right. This was not an exceptional case, for the authorities clearly showed that an athlete's own word on its own would be unlikely to be sufficient to satisfy the burden of showing lack of intention. This was not to say that an athlete who fails to discharge the burden is being categorised as a cheat: cf. *WADA v Egyptian Anti-Doping Organisation and Anor*, (CAS/2016/A/4563) at 58. It was simply insufficient to refer to a given supplement and say it must have been contaminated. We were referred to various authorities in Mr Segan's skeleton argument and at the hearing to, amongst others, the CAS decisions in *WADA v International Weightlifting Federation* (CAS/2016/A/4377) at 57-58, *Villanueva*, cited above, at 37-8, *Guiñez v UCI and Ors* (CAS/2016/A/4828) at 136-8. We were also referred to several authorities where the mere word of an athlete that an Adverse Analytical Finding must have come from a contaminated source was found to be insufficient.

20. Mr Segan also submitted that the approach of the Tribunal to noting what other evidence could have been, but was not, adduced on behalf of Mr Staples was entirely orthodox and in line with numerous authorities to which we were referred. The absence of any test purchase of Nitro-Tech, which would have been available for analysis, was particularly significant. But it was the cumulative effect of the lack of evidence, other than that of Mr Staples himself, which was significant.

21. As for what the Tribunal said about the concentration levels of the prohibited substances found on testing, Mr Segan reminded us that the onus of proof to show lack of intention was on the Player. The RFU did not have to prove anything. Accordingly, whilst the anti-doping authority undoubtedly had called expert evidence in other cases in the past, there was no basis for any criticism of the RFU for not having done so here. It had been for Mr Staples to adduce evidence to show how the steroids in the concentration levels found had entered his system. These were far above the maximum concentration levels for the particular steroids in question which were prescribed in the WADA technical document TD2018MRPL. Merely pointing to a supplement taken some seven weeks beforehand could not be sufficient. And any doubt about this was now reinforced by the fresh evidence from Professor Cowan.

22. Turning to Mr Baines's criticism about the standard of proof, Mr Segan submitted that the Tribunal plainly did have the correct standard, i.e. the balance of probability, in mind. Indeed this appeared from the sentence in the Decision immediately preceding the use of the word "sure" as well as the same sentence's reference to tipping the balance. Other express references to the balance of probabilities were to be found in paragraphs 31 and 42.

DISCUSSION

23. As an Appeal Tribunal, it is not our function to come to our own fresh judgment on the evidence. Our function is to consider whether the Decision was "erroneous": see NADP Rules at 13.4.2. As was said in *Buttifant*, cited above, at 8:

> The basis of any appeal must be that the tribunal erred in principle. An error of law, such as a misdirection on the meaning of the relevant anti-doping rules, will fall within the rule, but the appeal tribunal will not re-evaluate the factual findings. On questions of fact, the test is whether there was evidence which could support the findings made, whether there was a failure to take into account relevant evidence, and whether the findings are logically reasoned. The appeal tribunal must be careful not to apply its own views as to the weight of the evidence, or particular parts of the evidence. That restraint on the part of the appeal tribunal will particularly apply to findings

> of fact which may depend on the credibility of witnesses. Provided there is sufficient evidence to justify the finding, it is the first instance tribunal which will determine the primary facts, the weight to be attached to those facts and the inferences to be drawn from them.

24. The ADR do not specifically require that, in order to show that an anti-doping rule violation was not intentional, a Player has to prove how a substance entered his or her system. Nevertheless, there is a consistent line of jurisprudence to the effect that it is likely to be a rare case before a tribunal will be satisfied that the ingestion of a substance was not intentional if the tribunal cannot even know how the substance was ingested. This is affirmed in *Buttifant*, cited above, and is consistent with the CAS authorities: see, for example, the *International Weightlifting Federation* case, cited above, at 51-2 where the CAS tribunal said:

> 51. The Athlete bears the burden of establishing that the violation was not intentional within the above meaning, and it naturally follows that the athlete must also establish how the substance entered her body ….
>
> 52. To establish the origin of the prohibited substance, CAS and other cases make clear that it is not sufficient for an athlete merely to protest their innocence and suggest that the substance must have entered his or her body inadvertently from some supplement, medicine or other product which the athlete was taking at the relevant time. Rather, an athlete must adduce concrete evidence to demonstrate that a particular supplement, medication or other product that the athlete took contained the substance in question.

25. There are two particular features of the present case which should be mentioned. First, (leaving aside the somewhat insubstantial evidence of Ms Parry) there was no corroborative evidence to support that of Mr Staples himself. Secondly, there was no evidence at all to prove, even assuming that Mr Staples did consume what appeared to be the Nitro-Tech supplement, that this supplement was in fact contaminated with those steroids which were discovered in Mr Staples's system on 9 August 2017. To infer this would be entirely speculative.

26. It is true, as Mr Baines points out, that in *Buttifant* at first instance the Tribunal was able to accept little else other than the athlete's own word and his assumptions in order to reach a conclusion that his ingestion of the prohibited substance was not intentional. One must be careful not to treat the findings of fact in one particular case as if they represented statements of principle. Nevertheless, we do accept that there is no mandatory requirement for corroboration even though there undoubtedly are a considerable number of cases where tribunals have commented adversely upon its absence.

27. If a tribunal has nothing other than an athlete's own word and speculation as to how a prohibited substance came to be ingested, it is understandable that the evidence will be looked at with rigour. It would be all too easy for an athlete to say that he or she has never knowingly taken a prohibited substance, and it must have come from a contaminated product like a supplement. An Anti-Doping Organisation is rarely in a position to respond to such evidence. It is for this reason that tribunals tend to be rather sceptical in cases which depend solely on an athlete's word. There is a search for what has been called more "concrete" evidence than that.

28. In our view the Tribunal in the present case made no error of principle in commenting on the lack of any corroborative evidence to bolster the evidence of Mr Staples. Its approach in commenting upon evidence which might have been, but was not, adduced was entirely orthodox. There are numerous examples of such an approach in the decided cases including those to which Mr Segan referred us. Mr Baines terms this approach as drawing adverse inferences from an absence of evidence. In our view it is not really accurate to say that the Tribunal drew "adverse inferences". The Tribunal was simply searching for something more than just Mr Staples's version of events and commenting on its absence. And there was no evidence at all to link the steroids found in Mr Staples's system to the Nitro-Tech protein shake advanced, albeit speculatively, as the source.

29. The Tribunal did not explicitly find Mr Staples to be an untruthful witness. The closest it came was the comment in paragraph 46 of the Decision:

> However, if there was additional evidence that would assist a tribunal in making its determination, which was readily available, but not advanced, it does affect the credibility of the athlete and his version of events.

30. But, ultimately the critical factor in the present case was that there was simply no evidence at all to link the steroids found in in Mr Staples's system to the Nitro-Tech protein shake advanced, albeit wholly speculatively, by Mr Staples as the source. This lack of evidence did not depend on Mr Staples's veracity. However, without the evidence the Tribunal could not know how the steroids came to be in Mr Staples's system and, without in turn knowing that, was not able to come to a conclusion that their ingestion was not "intentional" (as defined in the ADR).

31. We can deal briefly with the suggestion that the Tribunal applied the wrong standard of proof. It is true that the Tribunal said that it could not be "sure" that Mr Staples consumed Nitro-Tech in South Africa. But this was immediately after having expressly referred to the balance of probabilities and immediately before a reference to tipping the balance. In paragraphs 31 and 42 of the Decision the Tribunal made it absolutely clear what standard of proof it was applying. This ground of appeal is in our view unsustainable.

32. The one area which has caused us some concern relates to the concentration levels of the steroids found in Mr Staples's system. To the lay person it might seem surprising that the levels found could stem from a contaminated supplement consumed some seven weeks beforehand. Nevertheless, this is essentially a scientific matter, and the fact is that there was no scientific evidence before the Tribunal. If the Tribunal had expressed a conclusion that Mr Staples's evidence was not credible in the light of the seven week gap, that would in our view not have been open to the Tribunal. However, we do not think that on a proper analysis the Tribunal was making such a finding. The Tribunal did not go further than noting - in our view correctly - that Mr Staples's evidence could have, but had not, addressed any inference to be drawn from the concentration levels.

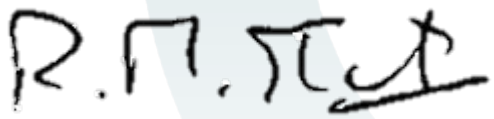
33. The Tribunal was quite correct in noting that the onus of showing that his ingestion of the steroids was not intentional lay upon Mr Staples. Given that the concentration levels had been put in evidence, it was for Mr Staples to address them. If necessary, Mr Staples's

representatives could have objected to the concentration levels being put in evidence unless someone from the Drug Control Centre at King's College London, the source of the evidence, attended to give evidence and answer questions about them. In the event, the evidence about concentration levels was put in evidence by the RFU but left hanging in the air. It appears to us that the only purpose of the RFU putting the concentration levels in evidence could have been to cast doubt upon Mr Staples's version of events. In our view any such objective should have been based on scientific expert evidence.

34. Despite our reservations over the deployment of the concentration levels without any expert evidence, they do not affect our overall conclusion that there was here no error of principle by the Tribunal. It reached a conclusion which was undoubtedly open to it on the totality of the evidence.

CONCLUSION

35. In the result, and for the reasons set out above, we dismiss the Appeal. Neither party sought an order for costs.



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Chairman on behalf of the Appeal Tribunal

London, 16 April 2018

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